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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

13 Cr. 811 ALC

5 ANDY MACCOW,

6 Defendant.

7 -----x  
8  
9 April 9, 2015  
10 2:40 p.m.  
11  
12 Before:  
13 HON. ANDREW L. CARTER, JR.,  
14 District Judge  
15  
16 APPEARANCES  
17 PREET BHARARA,  
18 United States Attorney for the  
19 SEAN S. BUCKLEY,  
20 Assistant United States Attorney  
21 DOAR, RIECK, KALEY & MACK  
22 Attorneys for defendant Maccow  
23 BY: WALTER STAUNTON MACK, JR., Esq.  
24 Of counsel  
25  
Also Present:  
EMILY FRANKELIS,  
U.S. Probation Officer SDNY

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1 (In open court)

2 (Case called)

3 THE COURT: You may be seated. Good afternoon. Good  
4 afternoon, Mr. Maccow. We're here today to impose sentence in  
5 the case of the United States versus Andy Maccow.6 In preparation for today's sentencing, I have received  
7 a sentencing submission from the defense, dated March 6th,  
8 along with a psychological report, dated January 26th, 2015.9 I have received a letter from the government and a  
10 supplemental letter from the defense as well. Obviously, I've  
11 reviewed the presentence report. Is there anything else -- I  
12 also have a Victim Impact Statement, dated April 1st, 2015 --  
13 is there anything else I should have, counsel for the  
14 government?

15 MR. BUCKLEY: Not from the government, your Honor.

16 THE COURT: Counsel for the defense?

17 MR. MACK: Your Honor, I don't believe so, but I do  
18 want to indicate what our position would be in light of the  
19 delivery of the government's letter last night about 11:40 pm  
20 to us, that we are not ready for sentence.

21 THE COURT: Your position is what?

22 MR. MACK: We are not prepared for sentence because we  
23 did not have the week the rules require for response. I didn't  
24 want the sentencing to get under way too far without the court  
25 being aware of that.

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1                   THE COURT: Okay. I will certainly give you time to  
2 be better prepared. Give me a sense in terms of what sort of  
3 information that you need and will be seeking that I can make  
4 sure that I am prepared as I can be.

5                   MR. MACK: Well, the government went from the court  
6 should give three levels for acceptance of responsibility up  
7 until 11:30 last night, and now they are taking the view that  
8 we don't get three levels of acceptance.

9                   Their reasoning for that is that my client is prepared  
10 to perjure himself on the stand with respect to his prior  
11 statements. So if the government is going to persist, that was  
12 a complete change of view. Up until 11:40 last night, their  
13 view was the plea agreement complied, we are bound by it.

14                  If, in fact, now their position is as explained to me  
15 in their position last night was that since my client is now  
16 going to take the stand or respond to your Honor's questions on  
17 the obstruction count differently than what he said when he was  
18 arrested in 2013, that is proof that he is no longer worthy of  
19 an acceptance of responsibility level decrease.

20                  I am going to ask the court for a hearing of some kind  
21 because I believe that it may very well be certain that that  
22 prior statement which they are relying on, which was never  
23 tested in suppression, never went to motions in the case, that  
24 it is inconsistent with the law in this circuit and it is  
25 unfair to the defendant. It is certainly unfair to the

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1 defendant to hit him with it on the eve, on the actual  
2 morning -- I didn't see it until after midnight this morning.

3 THE COURT: Okay. Counsel for the government, is  
4 there anything you want to add on that?

5 MR. BUCKLEY: Yes, your Honor. To be clear, I think  
6 Mr. Masimore's letter and the government's position is that the  
7 calculations, the guidelines calculations as performed by the  
8 Probation Office are correct as set forth in the presentence  
9 investigation report.

10 Mr. Masimore's letter acknowledges that because it  
11 recognizes that as part of sentencing under 3553, your Honor is  
12 obligated to undergo a guidelines calculation. So I think that  
13 was the acknowledgment made by Mr. Masimore in conceding that  
14 the Probation Office's calculations were correct.

15 At no point -- and I think Mr. Masimore's letter is  
16 very clear on this point -- at no point does the government  
17 indicate it intends to break its plea agreement or argue for a  
18 sentence outside of the range, the stipulated range set forth  
19 in the parties' plea agreement. I don't think that is actually  
20 an issue here.

21 With respect to Mr. Mack's statement that he intends  
22 to call the defendant to the stand at sentencing and that he  
23 anticipates that the defendant under oath will contradict  
24 statements that he previously made after receiving Miranda  
25 warnings to the arresting agents, I think we may be in a

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1 situation, your Honor, where it becomes necessary for there to  
2 be a Fatico hearing. If the defendant is arguing he did not,  
3 in fact, make those statements, then the government is entitled  
4 to put on evidence to refute that claim and to show that he  
5 did, in fact, make those statements.

6 THE COURT: Okay. Thank you. Let's talk about some  
7 of these issues. We won't go forward with the sentencing  
8 today, but let's deal with some of these other issues. There  
9 were other objections that defense counsel had to the  
10 presentence report. I want to address some of those as well in  
11 addition to this objection.

12 If we can, let's see if we can deal with some of these  
13 now. If counsel are ready to deal with some of these  
14 objections, let me just put on the record and make sure we're  
15 clear on the record here, Mr. Maccow, have you had an  
16 opportunity to go over the presentence report with your  
17 attorney and discuss any objections you might have to it?

18 THE DEFENDANT: Certainly.

19 THE COURT: I have received objections from the  
20 defendant, through counsel. I don't believe there are any  
21 objections from the government to the presentence report.

22 Is that correct?

23 MR. BUCKLEY: There were, your Honor, but as set forth  
24 in the government's letter, we have withdrawn those objections.

25 THE COURT: Okay. So let's talk about some of these

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1 other objections here. The first objection, I am looking at  
2 Exhibit 3 of the defendant's initial submission on March 6th,  
3 2015, Mr. Maccow objects to the term "aliases," okay?

4 That is fine. He says that his name is Andy Hector  
5 Maccow Checco; and, therefore, any different names that were  
6 given when he was arrested on other occasions were not really  
7 aliases, they were just different versions of his name.  
8 Counsel for the government, any position on that?

9 MR. BUCKLEY: Your Honor, a different version of a  
10 name is an alias. It is an alternative means of referring to  
11 somebody. I don't think it is material to the sentence your  
12 Honor is going to impose. If the defendant acknowledges that  
13 he went by those alternate names, we're fine having "alias"  
14 stricken from the presentence report.

15 THE COURT: Counsel for the defense, I don't find this  
16 particularly probative of anything.

17 MR. MACK: It isn't although my argument would be the  
18 Probation Department has proposed a recommendation that is  
19 inappropriate for this defendant and that this is some sign  
20 that when they want to use and make a decision that is harmful  
21 to the defendant, they choose to do so.

22 Could I just mention one thing, just to introduce Mr.  
23 Checco is in the courtroom today. The fact that this was  
24 adjourned from the 8th because we didn't know what the  
25 government was going to say until last night, there were many

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1 more people who had planned to be here on the 8th. We presumed  
2 that the government would adhere to its position and the  
3 sentencing would occur, and so the fact when a sentence does  
4 get adjourned at the last moment, at least if it is not a half  
5 hour, the impact often on working family members, there would  
6 have been other people here today of some consequence.

7 THE COURT: Let's go to the next objection by the  
8 defense, February 25th, 2011, at Page 8, Paragraph 15, the  
9 defendant claims that the defendant did not participate in this  
10 burglary. I want to make sure I'm clear as to what your  
11 objection is. Is the objection to the factual statement there?

12 I don't think that the statement in the presentence  
13 report claims that Mr. Maccow was present at the burglary, but  
14 that he was in contact by cell phone with other individuals. I  
15 am not sure exactly what your objection is. Are you objecting  
16 to -- there is no statement in the presentence report claiming  
17 he was actually present when this burglary took place, that he  
18 was speaking on the cell phone with the individuals who were  
19 actually participating in the burglary.

20 MR. MACK: Maybe I should parse that out more  
21 carefully, but that is the burglary the probation officer picks  
22 out to do the computation. I do have a presentation here to  
23 make eventually at sentence, but that is the burglary they pick  
24 out to do their computation for the guidelines. He is not even  
25 there. I think he is in jail in 2011 anyway.

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1                   THE COURT: That certainly doesn't mean he is not  
2 guilty of a conspiracy or guilty of acting in concert if he is  
3 speaking on the phone. I am trying to parse out what your  
4 objection is. If your objection is he did not participate in  
5 any way, he wasn't on the phone, again I want to make sure we  
6 have all of this clear so if we have a hearing, we can have a  
7 hearing on all of this.

8                   MR. MACK: Right.

9                   THE COURT: It seems that the position that in the  
10 probation report is that he was not actually present, but he is  
11 accountable for what happened during the burglary because it  
12 was part of the conspiracy, and he was part of that acting in  
13 concert with them and he was speaking on the telephone with  
14 them and they're in constant contact on the cell phone with him  
15 while the burglary was taking place.

16                   MR. MACK: If I read the paragraph, it mentions three  
17 people including Maccow, and the second sentence says they  
18 stole tablets. It certainly isn't clear to me they're  
19 excluding Andy Maccow from participating.

20                   THE COURT: It says in the very first sentence of  
21 Paragraph 15, Edwin Araujo was present during this burglary and  
22 was in repeated contact by cell phone with Miguel Araujo and  
23 Andy Maccow at the time.

24                   MR. MACK: I don't think that is true, number one. I  
25 asked my client that because I read the next sentence to say

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1       they, including all three of them, stole tablets. He wasn't  
2       there.

3           THE COURT: Again I am not sure it is necessary that  
4       he be there. Perhaps he was there. The government have any  
5       information on this at this time?

6           MR. BUCKLEY: No, your Honor, other than your Honor's  
7       understanding of what is set forth here is correct from the  
8       government's perspective. The allegation -- not the  
9       allegation -- the statement contained in Paragraph 15 of the  
10      presentence report reflects that this defendant as a  
11      co-conspirator was involved in this burglary.

12           It does not claim that he was present for the  
13      burglary, but rather that he was in contact with at least two  
14      other individuals, one of whom was physically present at the  
15      burglary. Thus, the use of "they" in that paragraph is  
16      perfectly accurate. The defendant has pleaded guilty to  
17      conspiracy charges here. I don't think that there is any basis  
18      to the objection as phrased or as clarified further by Mr.  
19      Mack.

20           MR. MACK: Could I respond to that, your Honor?

21           THE COURT: Yes.

22           MR. MACK: I wouldn't want to waste the court's time  
23      on this. We got a list of burglaries when the heavy  
24      negotiations went on much earlier about what this plea would  
25      be, and we got a list of I believe it is eight pharmacies in

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1 which the government felt that my client had some  
2 responsibility for, and there was a major part of the  
3 discussion, and it will come up now, that the government has  
4 retreated from their plea agreement, but this was not one of  
5 them. So this came out of the blue.

6 I haven't had a moment to talk to him whether he -- I  
7 think he was in jail at the time. I will check. I don't know  
8 the answer to the question whether he is on the phone, but I  
9 certainly don't see any ambiguity about they stole tablets,  
10 meaning they took the tablets out of a pharmacy. Maybe I am  
11 old fashioned on that. It is not clear.

12 THE COURT: One thing that is an overarching concern  
13 in some of the submissions from defense counsel and some of the  
14 arguments here, you keep referring to the plea agreement and  
15 what is in the plea agreement. Obviously, the plea agreement  
16 is not binding on the Probation Department. It is not binding  
17 on me. I have to do my own independent evaluation of the  
18 guidelines, and the fact that something may not be covered in  
19 the plea agreement is sort of inapposite in terms of me doing  
20 my own independent evaluation of the guidelines and for the  
21 conduct that is involved in this offense. I just wanted to  
22 state that just generally.

23 We'll move on because there are some other things I am  
24 really more concerned about, some of those comments from  
25 counsel regarding the plea agreement. Your next objection is

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1 to Page 9, Paragraph 19 to 21, you say David Santiago did not  
2 participate in any of these burglaries. I am not sure what  
3 that has to do with Mr. Maccow's case. What is the purpose of  
4 that objection?

5 MR. MACK: The only purpose of that is that Mr. Maccow  
6 not acquiesce in something he did not believe to be true.

7 THE COURT: A larger objection, your next objection  
8 deals with the facts of the obstruction of justice enhancement,  
9 and you go on and on about what you claim or what Mr. Maccow  
10 claims happened during this.

11 I guess what I am concerned about is a couple of  
12 things. You say that this may be inconsistent with what the  
13 government claims, that your version may very well be  
14 inconsistent with what the government claims Mr. Maccow said  
15 when he was given his Miranda rights. What I am also concerned  
16 about is what Mr. Maccow said when he pled guilty, with counsel  
17 next to him, to obstruction of justice, and I have that portion  
18 of his allocution here in front of me.

19 Obviously for the enhancement to apply, there has to  
20 be a circumstance in which Mr. Maccow engages in conduct with  
21 the intent to obstruct justice, with the intent to somehow  
22 affect a criminal proceeding. What you have indicated in your  
23 objection seems to sort of vitiate any intent to obstruct any  
24 proceeding. It seems as if you're saying this is almost some  
25 sort of just self-defense, that he was just making an innocent

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1 inquiry and that the other individual started yelling at him,  
2 and he just hit him without any intent to obstruct justice.

3 MR. MACK: May I respond?

4 THE COURT: Hold on. What he said at the time when he  
5 pled guilty, with counsel next to him, at a portion when he is  
6 talking on Page 25 of the transcript, he says:

7 Again from at least 2008 until around October 30th,  
8 2013, I did agree with others that the Schedule II drugs,  
9 including oxycodone and oxymorphone, that I with others took  
10 from a pharmacy burglarized would be distributed and sold by  
11 others for profit.

12 Around May 19th, 2012, in the Southern District of New  
13 York, I lost my temper and struck a person who I believed was  
14 providing information to the police or other law enforcement  
15 people that were harming my friends in a criminal  
16 investigation. Then there was a discussion off the record  
17 between defendant and counsel, and then he continues -- to stop  
18 them from providing information to law enforcement. That is  
19 what he indicated in his allocution when he pled guilty to  
20 obstruction of justice.

21 MR. MACK: I understand that, your Honor.

22 THE COURT: Can you give me a sense as to, it sounds  
23 as if what you're saying is inconsistent what he said during  
24 his plea.

25 MR. MACK: I don't believe it it is, your Honor, for

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1 this reason. This was a matter of discussion at some length  
2 early on. I am hesitating to mention, but the point being is  
3 this: There is no question that when he started to go after,  
4 if that is the right word, he did not expect to see him. The  
5 statement that is proffered by the government, hey, let's get  
6 together, go out look for this guy and do damage to him.

7 The reality at least from my client, I went over this  
8 very carefully with my client, he did not expect to see this  
9 person. When he did see him, he confronted him and asked him  
10 questions, why are you doing this? Why are you doing that?  
11 Why is your lawyer not having other people there?

12 In my view, the only difference is the intent to  
13 obstruct and intimidate rather than being some plan that  
14 occurred well before the street encounter. It occurred when  
15 they met together, not expecting that to happen, and these are  
16 the facts, but he intended, and the purpose of the conversation  
17 was he was interrogating this guy why are you cooperating?

18 And that is what happened. It was not a planned  
19 meeting, hey guys, let's get together and go out and find this  
20 guy. It was something unexpected. But when he chose to speak  
21 with him and get cross with him and combat, get into a fight,  
22 it was designed to discourage him from further cooperation, and  
23 that is why, that is an obstruction of justice, at least as I  
24 see it.

25 THE COURT: Can you give me a sense as to why then

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1 under your facts that distinction makes a difference?

2 MR. MACK: It makes a difference because the intent.

3 It was the intent to affect this guy and obstruct  
4 justice. It just didn't go on for a long period of time. It  
5 started on the street on a meeting that was not planned, a  
6 happenstance meeting in which, hey, here is this guy, we have  
7 questions for him, we're going to find out what he's doing. To  
8 me, it is just a question of when that intent was formed. He  
9 is still guilty, but he is not a person who gets together and  
10 goes out looking, let's find this guy and do something to harm  
11 him.

12 That is the difference, and I am suggesting it is more  
13 accurate, and that is what my client says happened. It is not  
14 inconsistent with his plea because he, in fact, is  
15 acknowledging hey, I wouldn't have talked to this guy unless I  
16 thought he was cooperating against me or my colleagues. It was  
17 more than a conversation. It was a hostile conversation.

18 And they got into a fight, and so I don't see that the  
19 plea allocution is inconsistent. I am not trying to withdraw  
20 the plea. I am simply saying that basically the facts were  
21 different.

22 THE COURT: Okay. Counsel, for the -- I mean, that is  
23 fine. I take counsel's proffer. We can certainly have a  
24 hearing on this if that is what we need to do. Again I am not  
25 sure how much that distinction makes a difference. I am not

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1 sure if it is better, which is better, that he actually planned  
2 to in a targeted way go hurt this individual --

3 MR. MACK: Your Honor --

4 (Simultaneous voices)

5 THE COURT: -- or he on the spur of the moment decided  
6 to get into a violent encounter with someone because he  
7 happened to see them. I am not sure which is necessarily  
8 better or worse in terms of the history and characteristics of  
9 the defendant.

10 MR. MACK: The government certainly argues the former  
11 is much worse and he should be punished and denied acceptance  
12 of responsibility for it.

13 THE COURT: I don't think that is the government's  
14 position. I think the government's position is that the former  
15 is what happened. I don't think the government is taking the  
16 position one is worse or better than the other. The  
17 government's position is that -- let me not speak for the  
18 government. What is the government's position on that?

19 MR. BUCKLEY: Your Honor, again I think we are pretty  
20 much in agreement with the court's interpretation here. One  
21 additional thing I would point out is that in the course of his  
22 presentence interview, in the presence of defense counsel, the  
23 defendant gave yet a different account of what transpired, and  
24 that is at Paragraph 46 of the presentence report.

25 In that account, contrary to Mr. Mack's

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1 representations and his submission and here today, the  
2 defendant states that he went to the victim's neighborhood to  
3 ask him why he was cooperating. That appears to be on all  
4 fours with his post-arrest statement, which is simply that in  
5 May 2012 Araujo and Gonzalez heard that the CW was in the  
6 vicinity and they went to confront him.

7 At the end of the day when the rubber meets the road,  
8 your Honor, the simple fact is the defendant decided to  
9 confront the cooperating witness, that he decided to do so with  
10 an intent to deter the cooperating witness from engaging in  
11 further conduct. The account provided in the presentence  
12 report, in his post-arrest as well as at his plea allocution  
13 are all consistent in every material respect, and they are  
14 sufficient to establish the abhorrent and culpable behavior  
15 here which is what the defendant pleaded guilty to.

16 Again the government's position is that it is going to  
17 continue to abide by the terms of its plea agreement. It  
18 continues to argue only for the stipulated range set forth in  
19 that plea agreement. However, we acknowledge that the  
20 Probation Office was correct in following the guidelines and  
21 crafting a guidelines calculation that does not award  
22 acceptance of responsibility points.

23 THE COURT: Let me just ask defense counsel something  
24 else I guess related to this. Also I am a little concerned  
25 that in further objections on Page 3 of your submission, that

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1 last paragraph, going to 13, Paragraph 14, and you indicate  
2 although initially seeking trial, he accepted responsibility  
3 within the government's timetable, agreed to an obstruction  
4 count despite his counsel's misgivings.

5 Again, it is inappropriate for me to start getting  
6 into attorney-client communications. It is inappropriate for  
7 me to get into the meat of the negotiations between the parties  
8 regarding plea agreements and the like, but you put this  
9 statement here, and I am just concerned with this floating out  
10 here talking about counsel's misgivings.

11 Again I have the minutes from the plea allocution when  
12 Mr. Maccow pled guilty with counsel there, and I asked counsel  
13 at the end of the allocution if he knew of any legal defense to  
14 any of the charges. Counsel said no. I asked if there is any  
15 reason why Mr. Maccow shouldn't plead guilty, and counsel said  
16 no.

17 That just, I am wondering, I want to make sure there  
18 is no issue with any conflict of interest or anything like that  
19 going on in terms of this statement that is tossed out there.

20 MR. MACK: Your Honor, I respect that.

21 What I am saying is my misgivings, there was never a  
22 question, once I got the facts from my client with the  
23 specificity that I have described in our objections, that I  
24 thought he was guilty, but when I compared what the  
25 government's agents have written about what he said under the

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1       circumstances with what he told me was true, and believe me, I  
2       spent a lot of time thinking about this, and my initial  
3       misgivings were based upon what the government says he said  
4       when he was arrested, which is where we are going to end up  
5       combating.

6           I have no misgivings about once I got what I  
7       considered the truth from the defendant whether he should plead  
8       guilty or not, which is something the government insisted upon.  
9       I am not saying your Honor we want to withdraw our plea. He  
10       shouldn't have pled. I am saying on the contrary, it is just a  
11       different fact and circumstance situation than the government  
12       has portrayed it, that is all.

13           He is still guilty and that is with that word  
14       misgivings, they were initially, and I said initially, yes, so  
15       the point was when I first started off, I was saying hey, this  
16       is what you said when you were arrested. Is that true?

17           And we went from there to what version of the facts as  
18       my client reports them, which in my understanding of the law is  
19       that he is still guilty of obstruction of justice, and he pled,  
20       and I have no misgivings whether he should plead and no  
21       misgivings whether he was guilty.

22           THE COURT: Okay. And then further on Page 4 and Page  
23       5 of defense counsel's submission, you talk about how the  
24       defense stands by the offense level computation set forth in  
25       the plea agreement. On Page 5 you state that the plea

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1 agreement offense level in this matter was a subject of  
2 detailed negotiation over an extended period. Under no  
3 circumstances would the defendant have pleaded guilty to a  
4 charging instrument which denied him acceptance of  
5 responsibility credit and added enhancement to a  
6 non-obstruction count for obstruction, and also required him to  
7 plead to a substantive obstruction count, and then you add the  
8 Probation Department has simply chosen an offense calculation  
9 at the highest level in order to warehouse the defendant it  
10 does not appreciate or respect.

11 I guess, first of all, that last sentence, I am not  
12 sure where this sense is coming from, the Probation Department  
13 has some sort of grudge against Mr. Maccow, but be that as it  
14 may, you are free to take that position if you want to. I  
15 don't see that from anything in the presentence report.

16 Again getting into the stuff about the plea agreement,  
17 I get concerned when I see these things, "and under no  
18 circumstance would he have pleaded guilty to this charging  
19 instrument." I made very clear at the time Mr. Maccow pled  
20 guilty I would make the determination as to the guideline range  
21 that applies and I would make the ultimate determination as to  
22 the sentence that applies and that the parties' estimate  
23 regarding any guideline calculation was simply an estimate.

24 I want to make sure there is no confusion, no conflict  
25 of interest, no situation in which Mr. Maccow -- it was clear

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1 to me at the time Mr. Maccow pled guilty he understood that  
2 plea agreement was not binding on the court. These other  
3 statements here are giving me a little bit of pause. I want to  
4 clarify that. What is defense counsel's position on this?

5 MR. MACK: Up until 11:40 pm last night, I expected to  
6 walk in here and say the government and the defense agrees that  
7 the Probation Department's computation is wrong and the plea  
8 agreement, although a Criminal History III rather than IV,  
9 should be the guidelines. And so you can understand why my  
10 client -- that is where we thought we were when we were getting  
11 ready for sentence today on Tuesday morning. Now it is a whole  
12 different ballgame and maybe the rules don't apply to the  
13 government in terms of notice to the defense.

14 The point is, it was the government who said we  
15 disagree with Probation and we think the plea should apply. I  
16 am, I am certainly aware, your Honor, the final computation is  
17 what it is, but I thought I had a colleague and ally in front  
18 of me who was going to stand with me that the plea should  
19 stand. They objected on that basis, and until last night I  
20 assumed they would continue their objection.

21 Okay, grow up, Mack. They changed their mind midnight  
22 the day of sentence. Okay, fine. Now I understand. Now I  
23 have to take on -- and I plan to take on -- the Probation  
24 Department in terms of their calculation, and I think I can  
25 make a demonstration at some time that basically hey, they

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1 chose to combine these in such a way it is just a denial of  
2 acceptance of responsibility. That is a three-level hit, and I  
3 am going to suggest that three-level hit is not appropriate  
4 here. I have a right to challenge the Probation Department,  
5 and you have obviously the right to say Mack, you're full of  
6 whatever and I am going to let them stand. Up until last night  
7 the government was on my side that acceptance of responsibility  
8 should be granted. Now they're not. So grow up, Mack. I  
9 agree, I will grow up.

10 But I have a right to challenge that position that my  
11 client should get three points for acceptance.

12 THE COURT: I understand. I want to make sure it is  
13 clear even if both sides came in here and said we are in  
14 agreement this is what we think is correct, that that is not  
15 binding on the court and it is not binding on the Probation  
16 Department. That is what I am concerned about, the way this is  
17 stated, it makes it seem, it almost implies Mr. Maccow was  
18 under some impression that if defense counsel and the  
19 government were in agreement, that that is kind of what was  
20 going to be the case in terms of his guidelines. It was clear  
21 to me at the plea that that wasn't related to him certainly by  
22 me. I want to make sure there was no issue with that.

23 MR. MACK: Your Honor, believe me, Mr. Maccow and I  
24 know that ultimately it is your call, and he knew that at plea  
25 and what have you.

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1           It was some comfort to the defense that the government  
2 was going to argue in our behalf or at least be on the same  
3 side until last night, and it was something we thought might be  
4 helpful and might actually persuade your Honor that maybe we  
5 were right. That is no longer true, and I have said it again,  
6 Mack, grow up. We now need more time to try to convince you  
7 that the Probation Department's calculation which recommended a  
8 10-year sentence for this gentleman is not the one the court  
9 should adopt and that he should at least get the acceptance of  
10 responsibility, three level knock-down which Probation and now  
11 the government denied him. That is all we are asking for.

12           We understand it is ultimately your call and we know  
13 the Probation Department can be inconsistent. It is just some  
14 of the forces that would have been on our side reversed  
15 themselves last night. That is the way we look at it.

16           THE COURT: Okay. I just want to try to get a sense  
17 of where we're going to be as we move forward. Obviously, the  
18 sentence isn't going to happen today. I want to make sure  
19 we're on the same page, at least I am on the same page here.

20           Obviously, there are two different things that  
21 Probation has done here that I think the defendant objects to,  
22 but I am not sure. There is one thing I know they object to.  
23 The Probation Department has come up with a guideline  
24 calculation.

25           MR. MACK: Yes, your Honor.

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1                   THE COURT: In addition, the Probation Department has  
2 made a recommendation in terms of an appropriate sentence.  
3 What you've been saying thus far in this submission, and here  
4 today has been focused on the recommendation, but obviously we  
5 have to at the first point before we get to any sort of what  
6 the appropriate sentence should be, have to determine what the  
7 guidelines are.

8                   So I guess what I am saying, it would certainly be  
9 helpful, and I assume this is what the defense is going to do,  
10 if you can provide me with some case law or other things  
11 regarding the guidelines in terms of why it is because it seems  
12 to me you're taking the position -- I am not sure which  
13 position it is -- it seems to me you're taking the position the  
14 obstruction of justice enhancement should not apply in this  
15 case period, and then you're also taking the position that even  
16 though if it does apply, that the acceptance of responsibility  
17 should still be given.

18                   I want to get clarification from you as to what your  
19 position is because in your submissions you start talking about  
20 the way they grouped counts and the other things in terms of  
21 the acceptance of responsibility and obstruction and the like.

22                   What is your position on this?

23                   MR. MACK: My position on that is that three levels  
24 for acceptance of responsibility should be mine, and there is  
25 plenty of case law on that and I will get a court case. We

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1 just found out the government had been on our side on that up  
2 until midnight last night, but changed their view. Shame on me  
3 not having those cases today, but there are plenty of cases in  
4 the circuit on what is sufficient for acceptance. I intend to  
5 get those, your Honor, and I didn't know that I had another  
6 adversary on that point. I do, fine, that is why we are asking  
7 for time.

8 Now, with respect to the grouping decisions that were  
9 made, first of all, any adjustments are in the court's  
10 discretion, and I am perfectly able to argue hey, how many  
11 counts are you going to add two points to and also add an  
12 obstruction count if you group them one way or the other, the  
13 computation is different and actually works out better for the  
14 defendant if you compute them differently. You don't have to  
15 compute them, each count additional two points plus an  
16 obstruction.

17 If you analyze the conduct of this defendant, which is  
18 something that I would argue is also an impact or has an impact  
19 on that adjustment, he had a very discrete role, a very modest  
20 role. He is Defendant No. 10. He is an individual who is not  
21 out there doing certain things, and now I need to make more  
22 argumentation on those, your Honor, which I didn't realize  
23 until late yesterday and that is why I am asking for time.

24 The simplest way to look at it at least for three  
25 levels, which is of great consequence, is now I have to

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1 convince your Honor and go into combat with Probation and now  
2 the government on that which, as I say, I have said it too many  
3 times, were on my side yesterday. I am not trying to get out.  
4 The plea agreement is what it is. The plea agreement could be  
5 different. Maybe I learned lessons here. This plea agreement  
6 is very aggressive, and we are in it and I am not trying to  
7 walk away from it, and I certainly recognize that the court  
8 does need to resolve what are the guidelines in this case.

9 I will do my best to set forth clearly what it is, but  
10 three of those points are acceptance, and I will get the case  
11 law for those.

12 THE COURT: Okay. One other thing I think the parties  
13 should think about, I guess I need to give the parties notice  
14 of is obviously if there are multiple instances of obstruction  
15 of justice, the court certainly has the power to upwardly  
16 depart or vary under the guidelines to a range above that  
17 suggested by the guidelines if, in fact, there are multiple  
18 instances of obstruction of justice.

19 Obviously, I am not saying he has done that at this  
20 point, but if Mr. Maccow submits false documents or the like,  
21 obviously that could be grounds for finding additional  
22 instances of obstruction. It would certainly be something that  
23 I could take into consideration. One thing that I guess I'll  
24 give counsel notice of, I am wondering about earlier on in this  
25 case, in one of the early court proceedings here, Mr. Maccow

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1 made some statements in court on the record.

2 I have tried to advise Mr. Maccow that he didn't need  
3 to make any statements, but he decided that he wanted to. I  
4 said he can speak to his attorney, it is probably a better idea  
5 to do that, but he chose to do that. I want to bring some of  
6 this to the parties' attention. This is from Page 11 of that  
7 transcript which was filed, the transcript was filed on April  
8 16th, 2014, and it is Document 72.

9 At that time Mr. Maccow, who was represented or  
10 Mr. Brill was standing in for Mr. Maccow, says your Honor on  
11 behalf of Mr. Maccow, it is Peter Brill, Mr. Maccow has asked  
12 permission to address the court on a matter. I said okay.  
13 Just before you address me, you have to understand anything you  
14 say here in open court can be used against you.

15 Mr. Maccow said yes.

16 I said in a court of law you may want to speak to your  
17 attorney first.

18 Mr. Maccow said I want to address the court right now.  
19 I know exactly what I want to say to the court.

20 I said okay.

21 Mr. Maccow said yes, I want to say like me, Andy  
22 Maccow personally, I have a very strong drug habit. I use a  
23 lot of drugs. I used from marijuana to cocaine.

24 I interrupt. Hold on, hold on, hold on. Again you  
25 may want to speak to your attorney before you say these things.

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1                   Mr. Maccow says I don't want to speak to him. I just  
2 want to say it.

3                   I say before you go on, let me just make sure you're  
4 aware of this, all right?

5                   Mr. Maccow said I'm aware of it.

6                   I said let me be sure you're aware of where we are  
7 right now in this proceeding. What we're doing right now, this  
8 is not a trial, this is not a trial. When there is a trial,  
9 there will be a jury here presiding over that trial making  
10 factual determinations based on what is going on at trial.

11                  As a criminal defendant, you do not have a burden of  
12 proof in this case. The government has the burden of proof at  
13 all times. At trial the government would have to prove your  
14 guilt beyond a reasonable doubt. You have a right against  
15 self-incrimination. You do not need to say anything. If you  
16 say anything, whatever you say can be used against you in a  
17 court of law.

18                  Mr. Maccow said I understand.

19                  I go on. Even if you were, in fact, guilty, you don't  
20 have to plead guilty. You have a right to remain silent, go to  
21 trial and force the government to prove your guilt beyond a  
22 reasonable doubt. If the government failed to prove each and  
23 every element of the crime charged against you beyond a  
24 reasonable doubt, the jury would have to find you not guilty.  
25 So I want you to listen to what you have to say, but I want to

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1 urge you, make sure you understand that this is not a trial and  
2 if you're trying to tell me something that is very --

3 Mr. Maccow interrupts. I understand and I want to  
4 address the court.

5 I continue. If you're telling me other things that  
6 may possibly incriminate you or make your case worse, that is  
7 not a good idea. You may really want to talk to your lawyer  
8 before doing that.

9 Mr. Maccow says no, no, no. I understand everything  
10 you said, everything you just said right now. I still want to  
11 address the court. Can I stand up and address the court?

12 I reply, you can address me. You don't need to stand  
13 up. Go ahead.

14 Mr. Maccow: I have a very bad drug habit. The night  
15 of my incarceration I was, I didn't even know myself, I was --

16 I interrupt. Again here is the thing I want to  
17 express to you. I want to make sure you truly understand.

18 Mr. Maccow says yes, I understand. What is happening  
19 here, I truly understand the way this process works, all right?  
20 All right. Mr. Maccow says yes.

21 I say I'm not in a position where I can give you legal  
22 advice. You should talk to your lawyer about that.

23 He says I understand.

24 We continue for a little bit longer. I will say this.  
25 I say but as I explained to you, the government has the burden

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1 of proof. The government has an obligation to turn over a lot  
2 of discovery that has been discussed. There are things that  
3 you have in your mind that are not written down somewhere that  
4 might help you in trial. Generally speaking it is better, it  
5 is a better idea to hold on until the trial because what you're  
6 saying now is on the record and --

7 Mr. Maccow says I want it to be.

8 I say the government can hear this and use it against  
9 you.

10 Mr. Maccow says I'm okay with it.

11 And here is where Mr. Maccow continues: You know,  
12 like on the night that I got incarcerated, I wasn't in my right  
13 state of mind, so most of the questions that the agents was  
14 asking me, I wasn't understanding them. So I signed some  
15 papers without me being in my right state of mind, you know  
16 what I'm saying? It was like I was tricked on signing some  
17 paper that I didn't even know what I was signing for. Do you  
18 understand what I am trying to say, your Honor?

19 I just want it to be on the minutes that at that  
20 moment I didn't know what I was doing. I wasn't in my right  
21 state of mind. I don't want for the District Attorney to calm  
22 me down for no questions. I don't want to cooperate with  
23 nobody. I don't want to snitch on nobody. I just want my  
24 fellow co-defendants to know over here that I'm not trying to  
25 do that, you know what I'm saying?

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1                   I say okay. Thank you. You have had an opportunity  
2 to address me. That is fine. Thank you.

3                   Mr. Masimore says some things. I'll put it on the  
4 record Mr. Masimore says your Honor, I would just note the  
5 appropriate time for such a motion would be during the motion  
6 schedule with an affidavit under oath. I would caution  
7 everybody that we have evidence that shows that he was of  
8 complete sound mind on the night of his arrest, so any  
9 affidavit would not be truthful.

10                  In any event, your Honor, it appears from what is  
11 going on here that this defendant who just spoke may be under  
12 some pressure from the colleagues sitting around him. I am a  
13 bit concerned about that, your Honor, given the unusual nature  
14 of the outburst by the defendant without his counsel. I am not  
15 sure what to do about it, but it is certainly highly unusual  
16 and gives rise to some concerns.

17                  I say okay, thank you. Again hold on before, there is  
18 no need to say anything else again.

19                  Mr. Maccow says I'm saying I'm not under no pressure.  
20 Nobody pressured me to do nothing.

21                  I say hold on. This is not a trial, and at this point  
22 you're making -- again, this is not the right time for that  
23 point. That is why again it is usually best to remain silent  
24 and let your lawyer do the talking for you because what you've  
25 done at this point -- hold on, hold on, hold on, hold on -- and

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1 hold on a second.

2                   Then there is some more dialog. It goes to Page 17  
3 and some other counsel speak. I say hold on, hold on, all of  
4 you, this is not an opportunity for you to -- and Mr. Maccow  
5 continues: No. I just want to address the court. We came up  
6 with the conclusion, all 10 defendants, we want a speedy trial.  
7 I don't know why this should be adjourned.

8                   Please make sure you understand something here.

9                   Defendant Maccow: We understand everything. I say  
10 listen, obviously as you can tell, you're all facing some very  
11 serious charges. You have to listen.

12                  Another defendant says we're not dumb.

13                  Actually, let me rephrase that. That was a defendant.  
14 It wasn't Mr. Maccow that said. We want to address the court.  
15 We came up with a conclusion all 10 defendants want a speedy  
16 trial. I don't know why this should be adjourned.

17                  Mr. Maccow says he -- and Mr. Maccow says, she wants  
18 to sit and smile at me and she wants to come visit these guys.  
19 They don't know what the hell is going on with the case. I am  
20 going to speak for them. This is my life. They're not going  
21 to fuck with it. I'm done.

22                  So those were the statements Mr. Maccow made early on  
23 in this case. I am wondering, it may be helpful to have  
24 counsel address this since we are going to adjourn this,  
25 whether an obstruction -- you can address this at a later

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1 time -- whether or not an obstruction of justice enhancement  
2 should be applicable for that conduct, as which seemed to be  
3 designed to send a message to all the co-defendants that not  
4 only was he not cooperating, but that none of them should  
5 cooperate.

6 Again it is just something that I think counsel may  
7 need to be prepared to address at a future date. If you wish  
8 to address some of that now, you may.

9 MR. MACK: First of all, I substituted for Mr. Brill.

10 I certainly have spent a lot of time with Mr. Maccow,  
11 and that is the reason why I asked the court to have him  
12 examined as it was, and I certainly will be arguing at sentence  
13 that Dr. Paradise's report provides some insight into this  
14 individual's conduct and his needs going forward, and I  
15 certainly, were I here at that time, I would not have  
16 encouraged him to do that, but to sublimate that he was trying  
17 to do anything other than avoid perhaps not the wisest way,  
18 some danger of some kind, some perceived danger.

19 Was it the best way to do so? I don't know. I might  
20 have to talk to Mr. Brill to find out whether that was ever  
21 discussed. I just don't know the answer, but I will certainly  
22 ask the court, given those facts alone, to add that situation  
23 which the government mentioned last night I noticed for the  
24 first time, at least in a sentencing context, basically would  
25 be somewhat unfair to this defendant as he is.

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1           I think his current, shall we say, needs and with the  
2 Micro Program Dr. Paradis talked about, he might be mentally  
3 ill, the court's consideration whether further punishment for  
4 this gentleman is appropriate, and I will make that argument in  
5 the future. That will be my first shot of that.

6           THE COURT: I know counsel wasn't here and I wanted to  
7 make counsel aware of that. It does seem -- again I haven't  
8 made up my mind what I wish to do about that -- it seems that  
9 could serve as the basis for an obstruction of justice  
10 enhancement.

11           Again typically under the guidelines there is only one  
12 enhancement, but it could serve as another count of obstruction  
13 of justice -- not count, another incident of obstruction of  
14 justice which would entitle the court to upwardly depart or  
15 impose a variance sentence above that suggested by the  
16 guidelines. It certainly gives some insight as to where the  
17 appropriate sentence might be, and this is not a situation in  
18 which there would be a lot of controversy as to what happened.

19           We have the transcript, and I observed that. I was  
20 here when that happened. It is something to think about as we  
21 deal with this obstruction of justice enhancement. Again it  
22 seems to me counsel is free, if you wish to have a hearing on  
23 this issue to try to demonstrate that when the obstruction  
24 happened, it was sort of an unplanned thing and he didn't go  
25 out planning to meet this individual, it happened on the spur

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1 of the moment as opposed to him forming some deliberate plan,  
2 you can certainly have a hearing on that.

3 I guess again my thoughts are that if he provides any  
4 sort of false documents or false testimony or makes false  
5 statements to the court or encourages counsel to make false  
6 statements to the court, obviously those are other instances of  
7 obstruction of justice. Those are things that I can consider  
8 as well. We can deal with that at a future date.

9 It sounds like counsel wants to have a hearing and  
10 wants to have Mr. Maccow testify at that hearing about this  
11 obstruction enhancement, I suppose, to try to -- as further  
12 argument for the court not to take away acceptance of  
13 responsibility, but just to simply impose obstruction, although  
14 I don't want to put words in counsel's mouth.

15 Counsel, my understanding is you do wish to have a  
16 Fatico hearing?

17 MR. MACK: No.

18 THE COURT: You wish to have to have a hearing for  
19 Mr. Maccow to testify about the-obstruction. Is that correct?

20 MR. MACK: I am not certain. Mr. Maccow is an  
21 individual and there are many factors to evaluate, whether he  
22 can speak to these and what have you. I have spent many hours  
23 describing how significant it is for his credibility to not be  
24 put it at risk at any time. That is my problem, as counsel.  
25 It troubles me greatly that the court is alluding to an event

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1 for this individual that could further put this person in  
2 jeopardy for I call a warehouse sentence.

3 Those things concern me, but the court should not have  
4 any concern that I would as his counsel ever encourage him to  
5 take any kind of risk of false statement or false certainly. I  
6 am not sure when the government -- and this is one of the  
7 issues we talked about on suppression -- he will say wait a  
8 minute, he said this and said that. I want to make certain we  
9 don't hurt ourselves more by that situation.

10 My client tells me something, and I go over it as many  
11 times as I did, I believe him and I believe him here. I  
12 wouldn't have done it and put those objections in if I didn't  
13 feel that way.

14 THE COURT: Again I want to make sure, I am not saying  
15 Mr. MacCoy at this point has said anything that is not true. I  
16 am not making any of those kind of determinations. I want to  
17 make sure he is aware of that, that if he were to do something  
18 like that, if he were to make some statements that I deemed to  
19 be untrue, that would give me further ground to enhance his  
20 sentence for obstruction of justice or obstructive behavior and  
21 may be further grounds. I will wait to get the case law from  
22 you on this, but it also may serve as further grounds to deny  
23 acceptance of responsibility as well.

24 Why don't we do this then. It sounds like at some  
25 point defense counsel certainly indicated a need or a desire to

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1 have a Fatico hearing, so perhaps it makes sense to adjourn  
2 this matter for such hearing. In the interim, if defense  
3 counsel decides you don't want to have a hearing or the  
4 government decides they don't wish to have a hearing, we don't  
5 have do that.

6 We probably need a hearing because there does seem to  
7 be some real disagreement between the parties in terms of what  
8 happened with the obstruction of justice. There doesn't seem  
9 to be disagreement the obstruction of justice enhancement  
10 applies.

11 MR. MACK: There is no objection to the fact he pled  
12 guilty to the obstruction count. There will be objection that  
13 you hit him -- the Probation Department, now the government --  
14 has decided that he should also get two level bump in each of  
15 the other two counts along with it. That is their position.

16 I think I have a chance at least to try to describe to  
17 your Honor better who this individual is, and he does require  
18 time to speak to. He is not a person who is comfortable in the  
19 courtroom, let's put it that way. I need to spend time with  
20 him. I don't know if the word "Fatico" came from my lips, but  
21 if it did, I am not sure that is what is necessary.

22 THE COURT: That is what I am trying to get a sense  
23 of. It is one thing if you wish to have a hearing so that I  
24 have a full grasp of Mr. Maccow and what Mr. Maccow did out  
25 there that night in terms of the obstructive behavior. That is

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1 fine. In terms of your argument that the obstruction  
2 enhancement shouldn't apply to each of the counts of conviction  
3 in terms of grouping, that seems to me to be a purely legal  
4 argument. It doesn't require any sort of fact-finding.

5 MR. MACK: Your Honor, every adjustment is subject to  
6 discretion of the court, okay?

7 And my view is that I am not trying to say hey, the  
8 plea agreement covers it. I get that. I certainly understand  
9 the court and the Probation Department to say they're wrong.  
10 In terms of deciding whether two adjustments plus an  
11 obstruction count is appropriate given what the guidelines are,  
12 what the guidelines are is something that is a factual  
13 determination as well in terms of what was his conduct, what  
14 were the facts and circumstances under 3553 and should they  
15 affect whether or not he should get above the plea agreement  
16 and accept what Probation is asking for. That is a  
17 discretionary matter for the court.

18 I am going to argue that is within your discretion and  
19 try to convince the court in this situation with this defendant  
20 on these facts, that discretion should be exercised not to bump  
21 him up higher than the government agreed up until recently and  
22 deny him the acceptance.

23 THE COURT: Again I think just to be clear, I want to  
24 be sure that the parties understand each other's positions, as  
25 I understand the parties' positions, my sense is that the

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1 government and the defense -- well, the government certainly  
2 takes the position that it seems to me, based on your  
3 submissions, that regardless of the guideline range that I  
4 determine applies in this case, the government's position is  
5 that a sentence within that range of 92 to 115 months is  
6 appropriate. I think that is the government's position.

7 Am I correct there?

8 MR. BUCKLEY: That's correct, your Honor. We are  
9 abiding by the terms of our plea agreement here and we are  
10 seeking only a sentence within the range as stipulated in the  
11 plea agreement.

12 THE COURT: So I think that that is something that may  
13 have been the cause of some confusion because again while the  
14 parties may stipulate to whatever they want to in their plea  
15 agreement, again, as I have said ad nauseam, the plea agreement  
16 is not binding on me and there are only certain sort of  
17 tortured readings of the guidelines the parties may make.

18 The parties may make any kind of argument they wish to  
19 make. If the government feels -- I don't know what their  
20 position is -- if the government feels the Probation  
21 Department's guideline determination is correct, but  
22 notwithstanding that it seems that is the government's  
23 position, that they feel that they can't in good faith say that  
24 basically there may have been an error in the estimation under  
25 the plea agreement and that the Probation Department may have

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1 it actually correct in terms of the guideline range, but  
2 notwithstanding that, the government is standing by the  
3 agreement, which again is not binding on the court, to that  
4 extent the government is still taking the position that a  
5 sentence within that range of 92 to 115 months is appropriate.

6 MR. MACK: I get that, your Honor.

7 I would simply say, according to the terms of the plea  
8 agreement, we agree that there may be a different criminal  
9 history category computation, and we, and we said we think it  
10 is IV, but it actually turns out to be III. The government  
11 agrees with that. So if the plea agreement -- which, silly  
12 me -- applies, it would be Level 26, Criminal History III.  
13 That is what the plea agreement says in essence.

14 So the criminal history level would go down, and what  
15 really, if you comply with the plea agreement's terms, it is  
16 26, Level III, 78 to 97 months.

17 THE COURT: Again a plea agreement can't do all of  
18 that. I want to make sure there is no, no misunderstanding  
19 there. The guidelines are what the guidelines are. I have to  
20 make that determination. I want to hear from both parties in  
21 terms of making that determination. I want to look at what the  
22 Probation Department has, but I have to make that  
23 determination.

24 If, as sometimes happens in plea agreements, the  
25 parties miss something entirely and the guideline range is very

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1 different than what they anticipated at the time they entered  
2 into the agreement, so be it, right? The parties have their  
3 remedies under that, but again that is not something binding on  
4 the court. So I want to make sure that there is no confusion  
5 there, that is fine. That is where we are.

6 MR. MACK: There is no confusion, your Honor.

7 The plea agreement, if you read it, it says hey, the  
8 criminal history could be computed otherwise, and so it is what  
9 the agreement says. I am already out. I understand. My  
10 opportunity to stand up with the government and say your Honor,  
11 both sides, both parties think the plea agreement should abide.  
12 That would be Level III and would be Level 26. That is what it  
13 says.

14 But I know the court's going to instruct me. I fully  
15 understand I have a new burden and additional things to  
16 overcome and that is my job and I will try to do that.

17 THE COURT: I guess again we make be talking again  
18 about a distinction without a difference here. The appropriate  
19 thing, if the government was in agreement with you, the  
20 government could say that we, as the government -- or the  
21 government that they, as the government, agree that two points  
22 or three points for acceptance of responsibility should apply.  
23 They may do that based on the plea agreement. They may do that  
24 based on whatever. They can do whatever they wish to. Their  
25 reasoning can be whatever it is. Their real motive behind that

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1 can be whatever it is, but I've still got to make that  
2 determination what the guidelines are.

3 The fact it is in the plea agreement, the government  
4 can't promise you, and that is over and over, the government  
5 can't promise you what the guideline range is going to be, nor  
6 can they promise you what the sentence is going to be. That is  
7 up to me.

8 MR. MACK: I have that, your Honor.

9 THE COURT: That is where we are. Why don't we  
10 adjourn this. Do you wish to have a hearing as well on this  
11 issue? Obviously, if one side wants to have a hearing, we'll  
12 have a hearing. I want to make sure we are not in a situation  
13 where the defense decides they don't want to have a hearing,  
14 but the government does.

15 What is the government's position on a Fatico hearing  
16 otherwise on this obstruction point?

17 MR. BUCKLEY: I am a bit adrift here to put it lightly  
18 because I think the arguments as your Honor noted are really  
19 focused on the legal arguments about whether under the  
20 guidelines certain enhancements should or should not apply.

21 Now, Mr. Mack continues to try to weave into those  
22 legal determinations what the guidelines do or do not say,  
23 these claims from his client.

24 Now, if the defendant intends to take the stand, then  
25 I think a Fatico hearing is necessary. If the defendant under

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1 oath intends to recant the statements he made in his  
2 post-arrest, if the defendant intends to contradict the  
3 statements he made in his post-arrest that he made during his  
4 plea allocution and that he made in the presence of counsel  
5 during his presentence investigation, then, yes, I do think a  
6 Fatico hearing is necessary.

7 If, however, Mr. Mack does not intend to put the  
8 defendant on the stand and if, however, the defendant does not  
9 intend to bring forth competent evidence that otherwise  
10 contradicts those three consistent accounts of what occurred,  
11 then, no, a Fatico hearing is not necessary for all the reasons  
12 your Honor noted.

13 The defendant had pleaded guilty to obstruction.  
14 There is no dispute about that plea. There is no dispute that  
15 he stands convicted of that, and it seems that the dispute then  
16 centers upon the effect that that conviction has upon his  
17 guideline calculation which I don't think is a matter of fact.

18 THE COURT: Let's adjourn this.

19 Again, as I indicated before, counsel should be  
20 prepared at the next hearing, whether we're having a Fatico  
21 hearing or going straight to sentence, to be prepared to  
22 address this issue that I've raised regarding the possibility  
23 of an upward departure. Again I have an open mind on that or a  
24 sentencing variance above that suggested by the guidelines,  
25 whatever that guideline range turns out to be based on the

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1 conduct here in court. Counsel should be ready to address that  
2 as well. So can we get a date, Tara?

3 MR. BUCKLEY: Judge, I apologize for interrupting.

4 Just so the record is clear, the government disputes  
5 Mr. Mack's reading of the plea agreement as far as the criminal  
6 history category and what the agreement says the sentencing  
7 range is. The four corners of the agreement are clear, and  
8 that is what we are abiding by.

9 (Off-the-record discussion)

10 THE CLERK: Friday, May the 8th, at 2:00 pm.

11 THE COURT: Does that work for everyone?

12 MR. MACK: I wasn't certain I would have to say this.

13 I will be hospitalized for a heart valve operation and  
14 operated on on May 4th, which would put me, despite what  
15 happens today, I think Mr. Macow would like me to stay. I  
16 would like to stay, but I am not going to be appear in the  
17 month of May at all.

18 (Off-the-record discussion)

19 THE CLERK: Thursday, April the 30th, at 2:30.

20 THE COURT: Does that give counsel enough time?

21 MR. MACK: The only thing I would ask, that the  
22 government not serve me at 11:40 at night with their papers on  
23 the day of the hearing. That is my only request. I will try  
24 to -- pardon the --

25 THE COURT: Does that work for the government?

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1                   MR. BUCKLEY: It may be that May 8th will work better,  
2 but considering Mr. Mack's situation, medical concerns, we'll  
3 make it work, Judge.

4                   THE COURT: All right. We'll adjourn sentence till  
5 then. Is there anything else we need to deal with today,  
6 counsel?

7                   MR. BUCKLEY: Not from the government, thank you.

8                   MR. MACK: Not from the defense, your Honor.

9                   THE COURT: Thank you very much.

10                  Actually, while we're here, again I will state,  
11 counsel is free to make any argument counsel wishes to make. I  
12 didn't see anything in the probation report that made it seem  
13 that Probation had some sort of grudge against Mr. Maccow, but  
14 I will give Probation a chance to say anything you want instead  
15 of sitting here and taking shots all day.

16                  Is there anything Probation would like to say

17                  MS. FRANKELIS: Your Honor, I appreciate the offer to  
18 say something. I have calculated the guidelines as I believe  
19 they are accurate according to the guidelines manual, and my  
20 sentencing recommendation was within the range that I  
21 calculated which I believe to be correct, and it has nothing to  
22 do with anything personal toward Mr. Maccow. It is just what I  
23 believe is the just and fair and right sentence for this  
24 defendant.

25                  I understand that there are issues that Mr. Mack

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1 presented, but there is nothing that I have seen that make  
2 Mr. Maccow appear to have extraordinary situations that would  
3 warrant a sentence outside of the range, and I have recommended  
4 a sentence at the bottom of the range that I believe to be  
5 accurate.

6 THE COURT: Okay. Thank you. Anything else from the  
7 government or defense?

8 MR. BUCKLEY: No, your Honor.

9 MR. MACK: No, your Honor.

10 THE COURT: Have a good day.

11 (Court adjourned)

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